

APR 19 2006

**FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463**

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5576
DATE COMPLAINT FILED: Oct. 20, 2004
DATE OF NOTIFICATION: Oct. 27, 2004
LAST RESPONSE RECEIVED: Dec. 9, 2004
DATE ACTIVATED: July 6, 2005

EXPIRATION OF SOL: Oct. 12, 2009

COMPLAINANT: Timothy A. McKeever

RESPONDENTS: New Democrat Network;
Tony Knowles for U.S. Senate and Leslie D. Ridle,
in her official capacity as treasurer

RELEVANT STATUTES and
REGULATIONS: 2 U.S.C. § 434
2 U.S.C. § 441b(a)
11 C.F.R. § 100.26
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED: Disclosure reports

FEDERAL AGENCIES CHECKED: Internal Revenue Service

I. INTRODUCTION

This Complaint alleges that the New Democrat Network ran television advertisements in Alaska within one month of the 2004 Senate election that criticized "Republicans" and were coordinated with Tony Knowles for U.S. Senate (the "Knowles Committee"). Under the test for a coordinated communication, the complained of activity fails to satisfy any conduct standard. We therefore recommend that the Commission find no reason to believe that the New Democrat Network made prohibited in-kind contributions to the Knowles Committee or that the Knowles Committee received prohibited contributions or violated any reporting requirements.

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1 **II. FACTUAL BACKGROUND**

2 The New Democrat Network ("NDN") is a corporation that operates under Section 527
3 of the Internal Revenue Code. It has several related organizations that, over the years, have also
4 included a registered political committee. NDN produced the advertisement at issue.¹ The
5 Knowles Committee was Tony Knowles's principal campaign committee during the 2004 U.S.
6 Senate campaign in Alaska. See Knowles Committee Statement of Organization (Aug. 30,
7 2004). Leslie D. Ridle was (and remains) the treasurer of the Knowles Committee.

8 The Complaint alleges that NDN ran television advertisements in Alaska in connection
9 with the U.S. Senate race from October 12 through 18, 2004. Complaint at 1 and Ex. A.² NDN
10 admits that it "produced and distributed in Alaska" an advertisement (the "NDN Ad"), a CD-
11 ROM copy of which it enclosed with its response. The NDN Ad states as follows:

12 For eight years, America enjoyed the strongest economy in history. In the last
13 four, Republicans in Washington have given us the worst in a generation. Now,
14 Americans are sending a message: about 4,000 Alaskan jobs lost; 45 million
15 Americans without health insurance; a record surplus transformed into a record
16 deficit. It's time to restore the promise of America. Visit newdem.org to find out
17 how you can help.

18
19 NDN Resp. at 2 and Enclosure. The Complaint states that NDN used the same media-buying
20 firm ("Buying Time") to place advertisements in Alaska television markets as the Knowles

¹ NDN used the name "New Democrat Network" until January 31, 2005, when it formally changed its name to "New Democrat Network – Non-Federal Account." On April 14, 2005, this entity again changed its name and is now "NDN Political Fund." See Organization Name Change History, available at <http://www.irs.gov/politicalOrgsSearch/nameHistory.jsp> (last visited Aug. 19, 2005). See also www.ndnpac.org/media_library (last accessed Aug. 19, 2005).

² The initial complaint did not provide any copies, scripts, or descriptions of these "advertisements," although a supplement to the complaint included a printout of NDN's webpage that purported to contain a "partial transcript of the ads." Complaint Supplement at 1 and Attachment at 1. The text of the advertisement that NDN admits running in Alaska (quoted above) is substantially the same as the "partial transcript" referenced in the supplement to the complaint, except that it refers to "Alaskan jobs lost" and it includes a final sentence instructing viewers to visit its website. The "partial transcript" does not refer to Alaska or any candidate, although the word "Alaska" appears elsewhere on the webpage. *Id.*

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1 Committee used for its television advertisements. Neither Respondent contests this factual
2 allegation.³ The Complaint concludes that this activity constituted a coordinated
3 communication, and thus resulted in an unreported and illegal contribution to the Knowles
4 Committee. Complaint at 1-2.

5 However, Respondents contend that the activity at issue failed to satisfy the "content"
6 and "conduct" standards of the coordinated communications regulations. They argue that the
7 NDN Ad did not refer to any federal candidate, and therefore no "content" standard was
8 satisfied. NDN Resp. at 2-3; Knowles Comm. Resp. at 3-4. They also contend that the
9 Complaint contains only speculation about any alleged transfer of information between NDN and
10 the Knowles Committee, and therefore no "conduct" standard was satisfied. NDN Resp. at 2-3;
11 Knowles Comm. Resp. at 2-3. Finally, the Knowles Committee argues that because there is only
12 speculation about any transfer of information between it and NDN, the Knowles Committee—as
13 a candidate committee—cannot be charged with the receipt of a contribution under the "common
14 vendor" conduct standard. Knowles Comm. Resp. at 2.

³ The Complaint includes "buy sheets" that show Buying Time, a media buying firm, placed television advertisements for both NDN and the Knowles Committee during various time slots from October 12 through 18, 2004. Complaint at 1 and Exs. A and B. Consistently, NDN's IRS filings reveal that it paid Buying Time LLC a total of \$888,376 in six separate disbursements for "media buy[s]" from October 1 through October 18, 2004. *See* New Democrat Network – Non-Federal Account, Form 8872 (Political Organization Report of Contributions and Expenditures) (Oct. 21 and Dec. 2, 2004). The Knowles Committee did not report payments to Buying Time but did report payments of over \$250,000 to Squier Knapp and Dunn Communications for "media purchases" in the first two weeks of October 2004. *See* Knowles Committee Pre-Election Report (Oct. 18, 2004). Because one of the "buy sheets" indicates that Buying Time placed ads for the Knowles Committee, and because that committee does not deny that it placed such advertisements, it appears likely that Squier Knapp used Buying Time to place media purchases for the Knowles Committee.

III. LEGAL ANALYSIS

Generally, a payment for a “coordinated communication” is an in-kind contribution to a candidate or committee with whom or which it is coordinated.⁴ 11 C.F.R. § 109.21(b)(1). A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of a “content” standard; and (3) satisfaction of a “conduct” standard. 11 C.F.R. § 109.21. Here, the first two prongs of the coordinated communication test appear to be satisfied, but not the last prong. Therefore, we recommend that the Commission find no reason to believe that NDN made prohibited in-kind contributions to the Knowles Committee and no reason to believe that the Knowles Committee received prohibited contributions or violated any reporting requirements.

A. The Payment and Content Prongs of the Coordinated Communication Test Appear to be Satisfied

The first two prongs of the coordinated communication test—payment and content—appear to be met in this matter. The payment prong is satisfied because a person (NDN) other than the candidate paid for the advertisement. *See* 11 C.F.R. § 109.21(a)(1). Furthermore, the NDN Ad appears to satisfy one of the content standards—it is a public communication that: (1) “refers to a political party...”; (2) was publicly distributed 120 days or fewer before the relevant election; and (3) was “directed ... to voters in a jurisdiction in which one or more

⁴ NDN, as a corporation, is prohibited from making such an in-kind contribution and the Knowles Committee is prohibited from knowingly accepting such a contribution. 2 U.S.C. § 441b(a).

1 candidates of the political party appear on the ballot.” 11 C.F.R. § 109.21(c)(4).⁵ Here, the
2 NDN Ad was a “public communication” (because it was broadcast on television, *see* 11 C.F.R.
3 § 100.26) that referred to a political party (“Republicans”). *See* 11 C.F.R. § 109.21(c)(4)(i). The
4 NDN Ad appears to have been broadcast from October 12 through 18, 2004, well within 120
5 days of the 2004 general election. *See* 11 C.F.R. § 109.21(c)(4)(ii). Finally, the NDN Ad was
6 directed to voters in a state (Alaska) conducting an election for the U.S. Senate, which therefore
7 qualified as a jurisdiction “in which one or more candidates of the political party appear on the
8 ballot.” *See* 11 C.F.R. § 109.21(c)(4)(iii).⁶

9 **B. The Activity Cannot Satisfy Any Conduct Standard**

10 The alleged use by NDN and the Knowles Committee of the same media buyer
11 implicates the “common vendor” conduct standard. *See* 11 C.F.R. § 109.21(d)(4). As analyzed
12 below, we conclude that there is an insufficient basis on which to recommend an investigation
13 into whether the conduct standard is satisfied.⁷

⁵ As the Commission is aware, the D.C. Circuit affirmed the invalidation of the content standard of the coordinated communication regulations. *Shays v. FEC*, 414 F.3d 76, 102 (D.C. Cir. July 15, 2005) (pet. for reh’g *en banc* denied Oct. 21, 2005). Nonetheless, the “deficient rules technically remain ‘on the books’” pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. Oct. 19, 2004).

⁶ Although the Complaint refers to “electioneering communications” and “express[] advoca[cy],” Complaint at 2, the only communication for which we have any information (the NDN Ad) identifies no candidate, and it therefore cannot qualify under those content standards. *See* 11 C.F.R. §§ 109.21(c)(1) and 109.21(c)(3).

⁷ In addition to the common vendor standard, the Complaint alleges that three other conduct standards are met, including “request or suggestion,” 11 C.F.R. § 109.21(d)(1), “material involvement,” 11 C.F.R. § 109.21(d)(2), and “substantial discussion,” 11 C.F.R. § 109.21(d)(3). Complaint at 2. These allegations are completely speculative. The only information Complainant provided regarding the alleged request or suggestion and substantial discussion is to speculate that “[i]t is unclear whether the NDN has produced and distributed these ads at the suggestion or request of ... or after substantial discussion with the Knowles campaign,” but that it “seems likely” that there have been such discussions. *Id.* As to the allegation that there was material involvement, complainant asserts that it is “not possible” that the media buying firm (Buying Time) was “not aware” of various activities of the Knowles Committee and was also not “materially involved” in certain decisions with NDN. *Id.* These allegations are not sufficient to support a reason to believe recommendation. *See* MUR 4960 (Clinton for Senate) Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas (Dec. 21, 2000) (“[u]nwarranted legal conclusions from asserted facts ... or mere speculation will not be accepted as true”).

1 In order to satisfy the conduct standard for common vendor coordination, three
2 statements must be true: (1) the person paying for the communication "contracts with or
3 employs a commercial vendor ... to create, produce or distribute the communication"; (2) the
4 vendor has provided any of certain enumerated services "to the candidate who is clearly
5 identified in the communication" (or his authorized committee or a political party committee),
6 including the "selection or purchasing of advertising slots"; and (3) the vendor "uses or conveys"
7 to the person paying for the communication certain information about the candidate (or his
8 opponent or a political party committee) that is "material to the creation, production, or
9 distribution of the communication." 11 C.F.R. § 109.21(d)(4).

10 The facts of the present matter fail to meet the second element of the applicable conduct
11 standard, which requires the commercial vendor to have provided any of certain enumerated
12 services "to the candidate *who is clearly identified in the communication* ... or a political party
13 committee...." 11 C.F.R. § 109.21(d)(4)(ii) (emphasis added). The NDN Ad does not "clearly
14 identif[y]" Knowles. *Id.* Although the ad refers to a political party, thereby satisfying the
15 content prong, there is no allegation (nor do we have any information) that Buying Time
16 provided services to a political party committee.⁸

17 This application of the common vendor conduct prong does not appear to have been
18 intended. Any public communication that is publicly distributed within 120 days of an election,
19 that "refers to a political party," and is directed to voters in a jurisdiction in which one or more

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1 candidates of the political party appear on the ballot satisfies the "content prong" of the
2 Commission's "coordinated communications" regulations set forth in 11 C.F.R. § 109.21(c)(4).
3 In order to satisfy the "conduct prong" of the "coordinated communications" regulations through
4 the "common vendor" test set forth in 11 C.F.R. § 109.21(d)(4), the commercial vendor being
5 used must have provided services "to the candidate who is clearly identified in the
6 communication," to his or her opponent, or to a political party committee during the same
7 current election cycle. Thus, on the face of the regulation, where the vendor's prior client was a
8 candidate, the common vendor test can only be satisfied if the communication clearly identifies
9 the candidate who was the former client or his or her opponent, even if: (1) the communication
10 satisfies the "content prong" by referring to a political party; (2) the communication is intended
11 to affect that candidate's election; and (3) all other parts of the common vendor test are
12 satisfied.⁹

13 Despite the plain language of the regulation, we do not believe that the common vendor
14 test in the "conduct prong" was intended to add any additional *content* requirement. In this case,
15 where we have found that the content prong in 11 C.F.R. § 109.21(c) has been satisfied, the
16 additional content requirement would have the result of negating that finding. Rather, in all
17 likelihood, the phrase "to the candidate who is clearly identified in the communication" was
18 intended solely to limit which vendors would qualify as "common vendors" by requiring that the
19 vendor had provided services to a candidate (or to his or her opponent) who might be expected to
20 possess information that is material to a subsequent communication regarding the same election,
21 as opposed to providing services to any candidate at all.

⁹ In contrast, the content of the communication is irrelevant to the common vendor conduct test where the vendor's prior client was a political party committee.

1 Additionally, as the Knowles Committee argues, the coordination regulations provide that
2 a candidate committee receives a contribution that results from common vendor conduct only if
3 the candidate committee also engaged in conduct such as a request or suggestion, material
4 involvement, or substantial discussion. 11 C.F.R. § 109.21(b)(2) (referring to § 109.21(d)(1)-
5 (3)). As discussed *supra* note 7, the Complaint offers nothing more than speculation to support
6 the allegation that the Knowles Committee engaged in such conduct. This presents an
7 independent basis on which we recommend that the Commission find no reason to believe that
8 the Knowles Committee received a contribution in the form of a coordinated communication
9 based on the common vendor conduct standard.

10 Because no conduct standard can be satisfied, we recommend that the Commission find
11 no reason to believe that NDN made prohibited in-kind contributions to the Knowles Committee
12 and no reason to believe that the Knowles Committee received prohibited contributions or
13 violated any reporting requirements as alleged in MUR 5576.

14 **IV. RECOMMENDATIONS**

- 15 1. Find no reason to believe that the New Democrat Network violated 2 U.S.C. § 441b(a) as
16 alleged in MUR 5576.
- 17 2. Find no reason to believe that Tony Knowles for U.S. Senate and Leslie D. Ridle, in her
18 official capacity as treasurer, violated 2 U.S.C. §§ 441b(a) or 434 as alleged in MUR 5576.
- 19 3. Approve the appropriate letters.

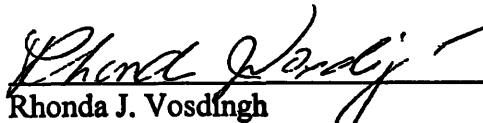
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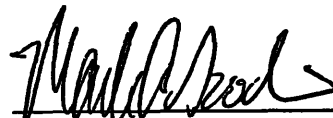
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